

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

EDWARD BINGHAM,

Petitioner,

v.

CASE NO. 2:21-cv-00392

RICHARD TAYLOR,

Respondent.

**MOTION TO DISMISS FOR**  
**INSUFFICIENCY OF SERVICE**

COMES NOW, respondent, Richard Taylor, by and through his undersigned counsel, and pursuant to F.R.C.P. 12(b)(5), hereby moves for the Court to dismiss the above-captioned matter for insufficient service, and in support states as follows:

1. Plaintiff filed a complaint in the above-captioned matter in the New Mexico Fifth Judicial District Court (“State Court”) on March 17, 2021.
2. Defendant removed this matter to this Court by notice filed on April 28, 2021, reserving his objection to sufficiency of service for failure to comply with the requirements of Rule 1-004(F), NMRA and F.R.C.P. 4(e)(1), as applicable.
3. Generally, “service of process under Fed.R.Civ.P. 4 provides the mechanism by which a court having venue and jurisdiction over the subject matter of an action asserts jurisdiction over the person of the party served.” *Hukill v. Oklahoma Native Am. Domestic Violence Coal.*, 542 F.3d 794, 797 (10th Cir. 2008) (reversing a district court denial of a defendant’s motion to dismiss because the plaintiff failed to comply with the applicable state rules regarding service of process).

4. Pursuant to F.R.C.P. 4(e), an individual may be served within a judicial district of the United States by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
  - (A) delivering a copy of the summons and of the complaint to the individual personally;
  - (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
  - (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

5. To the extent a party wishes to serve an individual pursuant to F.R.C.P. 4(e)(1), i.e., by complying with applicable state law, the applicable New Mexico law is Rule 1-004(F), NMRA. It provides that an individual may be served as follows:

(1)(a) to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service; or (b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the plaintiff attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the defendant has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant's last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business or employment of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant's last known mailing address and at the defendant's actual place of business or employment.

The substituted service provided by this Rule, as opposed to personal service, is “strictly construed” under New Mexico law. *See, Cooke v. Chavez*, 2001 WL 37125098 at \*2 (D.N.M.) (citing, *inter alia*, *Houchen v. Hubbell*, 1969-NMSC-162, ¶2, 80 N.M. 764, 461 P.2d 413.

6. Prior to removal, Plaintiff filed a return of service on April 9, 2021 in the New Mexico Fifth Judicial District Court. *See, copy of Return of Service attached hereto as Exhibit A.* The person signing the return attests that they served the summons and complaint on April 8, 2021, to “Bill Williams, the person apparently in charge at the actual place of business or employment of the Respondent...” The process server then interlineated a business address on the return form. However, the provision in the form relied upon by the process server further states “...and by mailing the Summons and Petition by first-class mail to the Respondent at “\_\_\_\_\_ (insert Defendant’s last known mailing address).” The process server left this provision blank.

7. Thus, Plaintiff has failed to comply with the applicable New Mexico procedural rule. While apparently attempting to comply with Rule 1-004(F)(3), NMRA, service at the actual place of business or employment, the process server failed to mail a copy of the summons and complaint to Defendant’s “last known mailing address and at the defendant's actual place of business or employment.” The return of service reflect that Plaintiff failed to mail to either address, much less to both. Such failure is fatal to asserting personal jurisdiction of this Court over Defendant. *Hukill, supra.*

8. Moreover, service at a person’s actual place of business or employment may only occur after the serving party fails to accomplish service through personal service or service at the person’s usual place of abode. Rule 1-004(F)(3) NMRA. Here, the return does not reflect any such efforts, as required by the Rule.

9. Plaintiff similarly failed to properly serve Defendant in accordance with the applicable Federal rule; there was no service to either the individual, at the party’s abode or dwelling, or to an authorized agent pursuant to F.R.C.P. 4(e)(2).



10. Based on the forgoing, the Court lacks personal jurisdiction over Defendant for insufficient service of process.

WHEREFORE, pursuant to F.R.C.P. Rule 12(b)(5), Defendant Chaves County Commissioner, Richard Taylor, District 4 of Chaves County hereby requests that the Court dismiss the above-captioned cause of action, and to grant such other and further relief as the Court deems just.

Respectfully submitted,

ORTIZ & ZAMORA, ATTORNEYS AT LAW, LLC

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*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 30<sup>th</sup> day of April, 2021, a copy of the Notice of Removal was filed electronically via CM/ECF, and that a copy of the foregoing pleading was mailed to the following party of record:

Edward Bingham, Pro Se  
3701 S. Atkinson  
Roswell, NM 88203

By: /s/ Tony F. Ortiz  
Tony F. Ortiz

Rule 1-004 NMRA Summons  
Fifth Judicial District Court

RECEIVED  
CHAVES COUNTY  
SHERIFF'S OFFICE

40  
10

2021 APR -9 AM 9:37

**FIFTH JUDICIAL DISTRICT COURT**

Chaves County, New Mexico  
Court Address: 400 N. Virginia Ave,  
Roswell, NM 88201  
Court Telephone: (575) 622-2212

**CASE NUMBER:** D-504-CV2021-164

**JUDGE:** Dustin K. Hunter

**STYLE OF CASE:**

Edward Bingham  
Plaintiff(s),

v.

Richard Taylor  
Defendant(s).

**DEFENDANT INFORMATION:**

Name: Richard Taylor  
Board of County Commissioners  
Address: 1 Saint Mary's Place  
Roswell, NM 88203

**TO THE ABOVE-NAMED DEFENDANT:** Take notice that

ORIGINAL: To Be  
Returned to Clerk of  
District Court for filing

1. A lawsuit has been filed against you. A copy of the lawsuit is attached to this Summons. The Court issued this Summons.

2. You must respond to this lawsuit in writing. You must file your written response with the Court no later than thirty (30) days from the date you are served with this Summons. (The date you are considered to be served is determined by Rule 1-004 NMRA) The Court's address is listed above.

3. You must file (in person or by mail) your written response with the Court. When you file your response, you must give or mail a copy to the person(s) who signed the lawsuit.

4. If you do not respond in writing, the Court may enter judgment against you as requested in the lawsuit.

5. You are entitled to a jury trial in most types of lawsuits. To ask for a jury trial, you must request one in writing and pay a jury fee.

6. If you need an interpreter, you must ask for one in writing.

7. You may wish to consult an attorney. You may contact the State Bar of New Mexico for assistance in finding an attorney by going to [www.nmbar.org](http://www.nmbar.org) or by calling 1-800-876-6657 (Toll Free) or (505) 797-6066.

Dated at Roswell, New Mexico, this 23<sup>rd</sup> day of March, 2021.

KATIE ESPINOZA  
CLERK OF THE DISTRICT COURT

By: Valeriano Miranda  
Deputy

Edward Bingham  
(Signature of Attorney for Plaintiff)

Edward Bingham  
(Name of Plaintiff)

3701 S. Atkinson Roswell, NM  
(Physical/Mailing Address) 88203

325 340 5373  
(Telephone Number)

EXHIBIT

A

tabbles

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**RETURN OF SERVICE**

STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF CHAVIS )

I, being duly sworn, on oath, state that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served this Summons in CHAVIS County on 8th day of APRIL, 2021, by delivering a copy of this Summons, with a copy of the Petition attached in the following manner:

☐ to the Respondent \_\_\_\_\_ (*used when Respondent accepts a copy of Summons and Petition or refuses to accept the Summons and Petition.*)

☐ to the Respondent by [mail] [courier service] as provided by Rule 1-004 NMRA (*used when service is by mail or commercial courier service.*)

☐ to \_\_\_\_\_, a person over fifteen (15) years of age and residing at the usual place abode of Respondent \_\_\_\_\_, (*used when the Respondent is not presently at place of abode*) and by mailing by first-class mail to the Respondent at \_\_\_\_\_ (*insert Respondent's last known mailing address*) a copy of the Summons and Petition.

☒ to BILL WILLIAMS, the person apparently in charge at the actual place of business or employment of the Respondent and by mailing by first class mail to the Respondent at 121 ST. MARY'S PLACE (*insert Respondent's business address*) and by mailing the Summons and Petition by first class mail to the Respondent at \_\_\_\_\_ (*insert Defendant's last known mailing address*).

☐ to \_\_\_\_\_, an agent authorize to receive service of process for Respondent \_\_\_\_\_.



☐ to \_\_\_\_\_, [parent] [guardian] [custodian] [conservator]


[guardian ad litem] of Respondent \_\_\_\_\_ (used when

*Respondent is a minor or an incompetent person).*

☐ to \_\_\_\_\_ (name of person), \_\_\_\_\_,

*(title of person authorized to receive service. Use this alternative when the defendant is a corporation or an association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision.).*

Fees: \_\_\_\_\_



\_\_\_\_\_  
*Signature of person making service*

*Deputy Sheriff MC15*

\_\_\_\_\_  
*Title (if any)*

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_  
*Judge, notary, or other officer  
authorized to administer oaths*

\_\_\_\_\_  
*Official Title*

#### USE NOTES

1. Unless otherwise ordered by the Court, this return is not to be filed with the Court prior to service of the Summons and Petition on the Respondent.